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THE CONSTITUTIONALITY OF WISCONSIN’S NONECONOMIC DAMAGE LIMITATION

INTRODUCTION

The early 1970s saw the first wave of what is now known as the medical malpractice insurance crisis. Between 1960 and 1970, insurance rates for physicians increased dramatically. Rates for non-surgical physicians increased an average of 540.8%, while the rates for surgical physicians increased an astounding 949.2%. As a result, physicians began an exodus from high risk specialty practices or relocated in geographic areas with lower malpractice rates. State legislatures across the nation became concerned about the potential impact of the crisis on health care delivery and moved to counteract the problem. The legislatures experimented with numerous reforms, including:

1. Limiting either the amount of recovery by plaintiffs or the liability of individual health care providers;
2. Reducing the statute of limitations applicable to medical malpractice actions;
3. Abrogating the collateral source rule in medical malpractice actions;
4. Establishing medico-legal screening panel plans; and
5. Establishing either compulsory or voluntary arbitration plans.

All the reforms were controversial at inception, but none more so than the limiting of a plaintiff’s ability to recover damages. That limitation has been challenged most often on constitutional grounds, as denying equal protection and due process of law.

On June 12, 1986, the Wisconsin legislature’s study of noneconomic damages reached fruition with the enactment of Assembly Bill 4. The bill

4. Redish, supra note 2, at 761.
7. Assembly Bill 4 was published as 1985 Wisconsin Act 340. 1985 Wis. Laws 1497.
created two new statutory provisions which are currently controlling on the question of noneconomic damages in Wisconsin.\textsuperscript{8}

Section 655.017 of the Wisconsin Statutes provides that for actions filed after June 14, 1986, the amount of noneconomic damages recoverable against a "health care provider"\textsuperscript{9} is subject to section 893.55(4) of the Wisconsin Statutes.\textsuperscript{10} Section 893.55(4) establishes the general framework of Wisconsin's noneconomic damage limitation. Subsection (a) defines the scope of the term "noneconomic damages," which is intended to be quite

\begin{quote}
8. \textit{Id.} at 1498.

9. "Health care provider" is a statutory term of art defined in Wis. Stat. § 655.001(8). That statute reads in pertinent part:

(8) "Health care provider" means a medical or osteopathic physician licensed under ch. 448; a nurse anesthetist licensed under ch. 441; a partnership comprised of such physicians or nurse anesthetists; a corporation organized and operated in this state for the purposes of providing the medical services of physicians or nurse anesthetists; an operational cooperative sickness care plan organized under §§ 185.981 to 185.985 which directly provides services through salaried employes in its own facility; an ambulatory surgery center; a hospital as defined by § 50.33(2)(a) and (c) and any entity operated in this state in connection with one or more hospitals and owned or controlled by the hospital or hospitals when the entity is assisting the hospital or hospitals in providing diagnosis or treatment of, or care for, patients of the hospital or hospitals; or a nursing home as defined by § 50.01(3) whose operations are combined as a single entity with a hospital subject to this section, whether or not the nursing home operations are physically separate from hospital operations. It excludes any state, county or municipal employe or federal employe covered under the federal tort claims act, as amended, who is acting within the scope of employment, and any facility exempted by § 50.39(3) or operated by any governmental agency, but any state, county or municipal employe or facility so excluded who would otherwise be included in this definition may petition in writing to be afforded the coverage provided by this chapter and upon filing the petition with the commissioner and paying the fee required under § 655.27(3) will be subject to this chapter.

Wis. Stat. § 655.001(8) (1987-88). As is clear from a reading of the statute, the definition includes some entities which might not be included in the layperson's definition of "health care provider." It is arguably the case that most laypersons think of human beings (such as a "physician") rather than entities (such as an "operational cooperative sickness care plan") as providing health care.

Conversely, the statute excludes some persons who might ordinarily be thought of as health care providers. Excluded persons would include dentists, optometrists, chiropractors, podiatrists (originally included but expressly deleted by 1985 Wis. Act 340 (1986)), psychologists, nurses and physical therapists.

10. Wis. Stat. § 655.017 (1987-88). The section provides:

The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the action is filed on or after June 14, 1986 and before January 1, 1991, . . . is subject to the limit under section 893.55(4).

\textit{Id.}

The legislature is experimenting with the noneconomic damage limitation on a five year trial basis; the statute creates a "sunset" date of January 1, 1991. \textit{See} Saichek, \textit{A Summary of the New Statutes Governing Medical Malpractice}, 59 Wis. B. Bull. 8, 10 (Oct. 1986).
broad. Subsection (b) makes clear that the statute includes actions against all "health care providers" within its limit.

Subsection (c) explains how the limitation effects verdicts. If there is a bench trial, the court makes findings as to actual noneconomic damages and then, if necessary, reduces them to the statutory limit. For a jury trial, the statute seems to require the jury to make the award without regard to the limit and then also reduce the damages if greater than the limit.

(4)(a) In this subsection, "noneconomic damages" means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

Id.

This definition is based on Wisconsin J.I.- Civil 1750A, subdivisions 5, 5A (1982). However, the drafters also added loss of consortium, society and companionship, love and affection to the definition. See Saichek, supra note 10, at 10.

(b) The total noneconomic damages recoverable under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, may not exceed the limit under par. (d) for each occurrence from all health care providers . . . acting within the scope of their employment and providing health care services who are found negligent and from the patients compensation fund for any action filed on or after June 14, 1986 and before January 1, 1991.

Id.

(c) A court in an action tried without a jury shall make a finding as to noneconomic damages without regard to the limit under par. (d). If noneconomic damages in excess of the limit are found, the court shall make any reduction required under § 895.045 and shall award as noneconomic damages the lesser of the reduced amount or the limit. If an action is before a jury, the jury shall make a finding as to noneconomic damages without regard to the limit under par. (d). If the jury finds that noneconomic damages exceed the limit, the jury shall make any reduction required under § 895.045 and the court shall award as noneconomic damages the lesser of the reduced amount or the limit.

Id.

14. One commentator has criticized the legislature's choice of language on this point. "Procedurally, the jury makes no 'reduction,' but only findings. The jury will find damages and the percentage of causal negligence. The court will do the rest." Saichek, supra note 10, at 10.
Subsection (d) is the damage limitation provision.\textsuperscript{15} It provides that the total noneconomic damages recoverable for any one occurrence is one million dollars, adjusted to the consumer price index.\textsuperscript{16}

This Comment takes the position that Wisconsin's noneconomic damage limitation would be upheld against a constitutional challenge. In Sections I and II, this Comment explains the constitutional background regarding damage cap challenges, and analyzes the success of equal protection and due process challenges in other states. Section III applies these standards to the Wisconsin limitation on noneconomic damages, and discusses the probable outcome. Section IV argues that a challenge to the Wisconsin noneconomic damage cap could only succeed by persuading the Wisconsin Supreme Court to expand the scope of intermediate scrutiny under the state constitution. Finally, this Comment reaches the conclusion that the noneconomic damage limitation is likely to withstand such a challenge because of the Wisconsin Supreme Court's refusal to expand state constitution intermediate scrutiny.

I. Equal Protection Challenge

The equal protection clause\textsuperscript{17} of the United States Constitution guarantees that all persons will be dealt with in a similar manner by the government.\textsuperscript{18} Traditionally, equal protection claims have been analyzed by the United States Supreme Court using a two-tier analysis consisting of the

\textsuperscript{15} Wis. Stat. § 893.55(4)(d) (1987-8). The section provides:
\(\text{(d) The limit on total noneconomic damages for each occurrence under par. (b) shall be } \$1,000,000 \text{ for actions filed on or after June 14, 1986, and shall be adjusted by the director of state courts to reflect changes in the consumer price index for all urban customers, U.S. city average, as determined by the U.S. department of labor, at least annually thereafter, with the adjusted limit to apply to awards subsequent to such adjustments.} \)

\textit{Id.}

\textsuperscript{16} Id. Assembly Bill 4 introduced the $1,000,000 limitation. However, other figures were introduced in amendment form. Assembly amendment 4 to Assembly Bill 4 would have substituted a $250,000 limitation. It was rejected 71-28. Similarly, assembly amendment 1 to assembly amendment 4 would have substituted a $500,000 limitation. This amendment was withdrawn before a vote could be taken. Legislative History of Assembly Bill 4 (microfiche 1, 1985 Wis. Act 340).

\textsuperscript{17} The equal protection clause reads in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

\textsuperscript{18} Nowak, supra note 17, § 14.2, at 525.
"strict scrutiny" standard and the "rational basis" test. However, a third test, the "intermediate scrutiny" standard, has now been recognized. Each standard will be discussed in turn, along with cases which illustrate how the standard has been applied in the medical malpractice context.

A. Strict Scrutiny

Strict scrutiny is the most rigorous standard currently in use. Under this standard, a court "independently determine[s] the degree of relationship which the classification bears to a constitutionally compelling end," rather than deferring to the decision of the political branches.

Application of the strict scrutiny analysis necessitates a two step process. First, a court determines whether the legislation creates a suspect classification or interferes with the exercise of a fundamental right. According to the United States Supreme Court, a classification is suspect when the "class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the . . ."


Analysis under the two-tier system has been criticized as overly rigid: [T]he lenient “rational basis” scrutiny applied to most statutes almost never results in voidance of the legislation, though the heightened “compelling state interest” scrutiny [strict scrutiny] almost invariably will. It is rigid because in theory it permits only two widely variant levels of scrutiny with no gradations for rights of intermediate importance. It is deficient because, as Professor Freund once remarked, the word does not move on a “binary principle.”


21. Professors Nowak, Rotunda and Young credit Professor Gerald Gunther’s article Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972), with first recognizing that the Court did not always apply the traditional two-tier scrutiny. NOWAK, supra note 17, § 14.3, at 531 n.13.


majoritarian political process." The Supreme Court has held few classifications to be suspect. These classifications have been based upon race, national origin, and alienage. The Supreme Court describes fundamental rights as those which have their origin explicitly or implicitly in the Constitution. Rights rising to the level of "fundamental" have also been limited.

If a court finds a suspect classification or interference with a fundamental right, a court next examines whether the legislation is "precisely tailored to serve a compelling . . . [state] interest." While a court nominally examines the nexus between the classification and the state interest, its scrutiny is in reality more rigorous. As Professor Gunther has noted, while this scrutiny is strict in theory, it is usually fatal in fact.

The Montana Supreme Court's decision in White v. State is one of very few which applied a strict scrutiny standard to a limitation on damages. In that case, the plaintiff alleged that the state was grossly negligent in allowing a violent mental hospital patient to escape. The patient attacked Ms. White and she allegedly sustained severe emotional harm, though no demonstrable economic losses. The state based its defense upon a provision of the Montana Code which limited governmental liability in tort. It gave the state immunity from noneconomic damages and limited

30. Plyler, 457 U.S. at 217; see also Bice, Standards of Judicial Review Under the Equal Protection and Due Process Clauses, 50 S. CAL. L. REV. 689, 694-95 (1977); Which Equal Protection Standard, supra note 19, at 133.
33. Id. at __, 661 P.2d at 1273.
economic damages to $300,000 for each claimant and $1,000,000 for each occurrence.\textsuperscript{34}

White, however, argued that the statute violated the principles of equal protection by classifying plaintiffs in three unconstitutional ways:

1. It classifies victims of negligence who have sustained non-economic damage by whether they have been injured by a nongovernment tort-feasor or a government tort-feasor. It totally denies any recovery to the latter class.

2. It classifies victims of government tort-feasors by whether they have suffered economic damages or noneconomic damages. It allows recovery to the former group up to $300,000 while it totally denies recovery to the latter group.

3. It classifies victims of government tort-feasors by the severity of the victims' injuries. It grants recovery to those victims who have not sustained significant injury by allowing them to recover up to $300,000 in economic damages. It discriminates against the seriously injured victims by denying recovery for any injuries over $300,000.\textsuperscript{35}

The court agreed. Its analysis proceeded under article II, section 16 of the Montana Constitution\textsuperscript{36} and found the right to bring suit for all personal injury damages to be a fundamental right under the state constitution.\textsuperscript{37}

Therefore, the court applied the strict scrutiny standard and refused to give any deference to the Montana Legislature's statutory enactment. "Application of this test requires that the statutory scheme be found unconstitutional

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at \textemdash, 661 P.2d at 1274. The statute providing immunity was former MONT. CODE ANN. § 2-9-104(1) (repealed ch. 675, L. 1983).
  \item \textsuperscript{35} \textit{Id.} at \textemdash, 661 P.2d at 1274.
  \item \textsuperscript{36} Article II, § 16 reads in pertinent part: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." MONT. CONST. art. II, § 16 (1987).
  \item For an interesting but somewhat unusual analysis, see Morgan, \textit{Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review}, 17 GA. L. REV. 77 (1984) (advocating that fundamental rights under federal equal protection should be expanded to include fundamental state rights; under this approach, the Supreme Court would defer to the states' designation of certain rights as fundamental).
\end{itemize}
unless the State can demonstrate that such law is necessary 'to promote a compelling government interest.'"\(^3\)

The application of the strict scrutiny standard made the court's decision a foregone conclusion; the statute was struck down in its entirety. The court was persuaded to apply strict scrutiny by language in its constitution to the effect that there must be a speedy remedy for "every injury."\(^39\) A limitation, the court held, which differentiates between plaintiffs who seek recompense for pain and suffering and those whose damages are economic in nature is discriminatory.\(^40\) No merit was found in the State's counter-argument that it had a compelling state interest in "insuring that sufficient public funds will be available to enable the State and local governments to provide those services which they believe benefit their citizens and their citizens demand."\(^41\)

*White v. State* illustrates the power of a state supreme court to expand fundamental rights under the state constitution if it so wishes. State supreme courts, as the interpreters of their respective constitutions, clearly have the power to engage in such expansion.\(^42\) However, as will be discussed below, few state supreme courts have chosen to exercise their power to strike down legislative damage caps in order to expand fundamental rights to include the right to recover the full damages awarded by the jury.\(^43\) More often, a state high court will defer to the findings of the legislature by analyzing the damage cap under the rational basis standard.

### B. Rational Basis

In cases in which no suspect classification or fundamental right is involved, a statute is scrutinized under the rational basis test.\(^44\) If a court chooses to apply this test, the legislation need only bear some rational relationship to a legitimate state purpose.\(^45\) This standard is an extremely def-

\(^{38}\) *White*, 203 Mont. at __, 661 P.2d at 1274 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972)).

\(^{39}\) *Id.* at __, 661 P.2d at 1275. "The language 'every injury' embraces all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and the loss of enjoyment of living. Therefore, strict scrutiny attaches." *Id.*

\(^{40}\) *Id.*

\(^{41}\) *Id.* While the court recognized that the "government has a valid interest in protecting its treasury," the court found that "payment of tort judgments is simply a cost of doing business." *Id.* Further, the court found no evidence that the payment of civil claims was impairing the functioning of the government or causing any financial crisis. *Id.*

\(^{42}\) See generally supra note 37 and articles cited therein.

\(^{43}\) See infra notes 44-66 and accompanying text.

\(^{44}\) *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985).

erential one, and leaves the correctness of the legislative judgment entirely up to the legislature. The two cases discussed below are classic examples of the application of the rational basis standard. Each court clearly evidences in its opinion great deference for legislatively enacted solutions to the medical malpractice crisis.

In Sibley v. Board of Supervisors, the plaintiff suffered severe side-effects from anti-psychotic drugs administered at Louisiana State University Medical Center. She suffered cardiopulmonary arrest as a result of the incident. The plaintiff sought damages in excess of the Louisiana $500,000 limit on state liability for medical malpractice damages and, therefore, challenged its constitutionality.

In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the law makers to believe that use of the challenged classification would promote that purpose?

Id. at 668.

46. Professor Gunther observes that "the 'mere rationality' requirement symbolize[s] virtual judicial abdication" by the Court to the legislative branches. Gunther, supra note 21, at 19.

47. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgement must convince the court that the legislative facts on which classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 111 (1978)).

A court is not to weigh conflicting evidence as to whether an act will succeed in effectuating the legislature's stated goals. Clover Leaf Creamery, 449 U.S. at 464-66. Also, social and economic legislation that does not employ suspect classifications or impinge on fundamental rights "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Hodel v. Indiana, 452 U.S. 314, 331-32 (1981). The Court is even willing to create fact situations to uphold a statute under the rational basis test. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961).

48. 462 So. 2d 149 (La. 1985).

49. Id. at 151.

50. Id. at 152. The relevant state statute is LA. REV. STAT. ANN. § 40:1299.39 (West 1977), which reads in pertinent part:

B. Notwithstanding any other provisions of the law to the contrary, any health care provided [sic] ("person" as defined herein) acting within the course and scope of his employment, health care facility staff appointment or assignment for or on behalf of the state to any health care institution whether or not he receives compensation for such services, shall not be held liable for any amount of damages in excess of five hundred thousand dollars plus interests and costs for any injury or death of the patient due to any alleged act of malpractice within the course and scope of such employment, staff appointment, or assignment. The state shall pay any costs of legal defense and damages awarded by judgment of a court or by a compromise after institution of a suit for a medical malpractice claim or claims against such health care provider ("person" as defined herein) not to exceed five hundred thousand dollars plus interests and costs.
The plaintiff argued to the Louisiana Supreme Court that the statute created discriminatory classifications in contravention of equal protection. First, the plaintiff alleged that doctors as a class received preferential treatment, since the statute relieved them of a substantial portion of their liability exposure. Second, the plaintiff alleged that the statute denied full recovery to any indigent plaintiff who used state-provided health care services.\(^\text{51}\) The court, however, found these arguments unpersuasive.

The court recited that equal protection requires strict scrutiny only where a suspect classification is created or a fundamental right is infringed. The court found suspect classifications to include the traditional classifications and left open the possibility of others to be considered on a case-by-case basis.\(^\text{52}\) However, without further discussion, the court held that this statute "[o]bviously ... does not involve a classification prohibited by equal protection considerations."\(^\text{53}\) Similarly, the court found no infringement on fundamental rights since one of the traditional, federal fundamental rights was not implicated.\(^\text{54}\) The court summarily rejected intermediate scrutiny as inapposite, and applied the rational basis analysis.\(^\text{55}\) Therefore, the court adopted an appropriately deferential stance towards the malpractice legislation:

[T]he legislative process is a difficult task and legislative solutions will be accorded great latitude and deference by the judiciary when dealing with an equal protection assessment. Assuming a legitimate state objective (and assuring the continued availability of quality health care is surely legitimate), the question is not "[w]hether in fact the Act will promote (the legislature's objective) [but] the Equal

\(^{51}\) Id. at § 40:1299.39A.(6)(B).

\(^{52}\) Sibley, 462 So. 2d at 154.

\(^{53}\) Id. at 155. The court first noted that traditionally "[c]lassifications based on race, religion or political beliefs are, of course, absolutely prohibited." \textit{Id.} However, the court remained open to considering the impact of other classifications. "[O]ther classifications are tested on a less rigorous basis, depending on the character of the classification involved and the strength of the state interest supporting the distinction." \textit{Id.} The court did not further define or discuss these possible "other classifications."

\(^{54}\) \textit{Id.}

\(^{55}\) \textit{Id.} at 156.
Protection Clause is satisfied by our conclusions that the legislature could rationally have decided that (it) . . . might . . . .

The court found that the statute did not violate equal protection.

A similarly deferential attitude was taken by the California Supreme Court in *Fein v. Permanente Medical Group.* In that case, Fein sued the Permanente Medical Group for failure to diagnose an impending heart attack despite clear symptoms. The jury awarded $500,000 in noneconomic damages, but the trial court reduced the amount to $250,000 pursuant to California’s statutory limit on those damages.

Fein alleged that the cap on noneconomic damages discriminated between both medical malpractice and other tort plaintiffs, and between those malpractice plaintiffs with noneconomic damages greater than $250,000 and those with less damage. As in *Sibley,* the court in *Fein* applied the deferential standard and found the limitation on noneconomic damages was a rational response to the “insurance ‘crisis’” in the state. In upholding

57. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).
59. Id. at 143-44, 695 P.2d at 669-70, 211 Cal. Rptr. at 372-73. The plaintiff’s expert witness testified that Fein’s life expectancy was reduced by half, rather than by the ten to fifteen percent that would have been the case had the condition been properly treated. Id. at 145, 695 P.2d at 670, 211 Cal. Rptr. at 373.
60. Id. at 145-46, 695 P.2d at 679, 211 Cal. Rptr. at 382. The applicable section of the Medical Injury Compensation Reform Act of 1975 (MICRA) is codified as California Civil Code § 3333.2 and reads in relevant part: “(a) In any [medical malpractice] action . . . the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).” CAL. CIV. CODE § 3333.2 (West Supp. 1989).
61. Id. at 161-62, 695 P.2d at 682, 211 Cal. Rptr. at 385.
62. Id. at 162, 695 P.2d at 682, 211 Cal. Rptr. at 385. In her dissent, Chief Justice Bird, while recognizing the preservation of insurance as a legitimate objective, found the legislation as enacted to be an arbitrary and unreasonable solution. “There is no logically supportable reason why the most severely injured malpractice victims should be singled out to pay for special relief to medical tortfeasors and their insurers.” Id. at 173, 695 P.2d at 690, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting). She would rather have seen relief to health care providers spread among a larger class of beneficiaries, such as health care consumers or taxpayers. “Millions of health care consumers stand to gain from whatever savings the limit produces. Yet, the entire burden of paying for this benefit is concentrated on a handful of badly injured victims — fewer than 15 in the year MICRA was enacted.” Id. at 175, 695 P.2d at 692, 211 Cal. Rptr. at 395. Justice Mosk, dissenting separately, advocated the use of the intermediate scrutiny standard rather than the rational basis standard. Id. at 179, 695 P.2d at 694, 211 Cal. Rptr. at 397-98 (Mosk, J., dissenting).

In the case of Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985), a federal court of appeals also upheld California Civil Code § 3333.2 in the face of a federal equal protection challenge. The court applied the rational basis standard, it said, because “malpractice victims with noneconomic losses that exceed $250,000 do not constitute a suspect class and the right to recovery of tort damages is not a fundamental right . . . .” Id. at 1435. The court rejected Hoffman’s argument that there was not a sufficient nexus between the statute and the legislative goal of
the cap on noneconomic damages, the court dismissed the plaintiff’s equal protection argument with little discussion.\textsuperscript{62} The court first dismissed the argument that a $250,000 limit on noneconomic damages is more invidious than a complete elimination of noneconomic damages from an equal protection standpoint. The court remarked: “Just as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the $250,000 limit — which applies to all malpractice victims — does not amount to an unconstitutional discrimination.”\textsuperscript{63}

The \textit{Fein} court also rejected the contention that the $250,000 limit is unconstitutional because the same results could have been obtained by a fixed percentage reduction on noneconomic awards. The court held the choice between reasonable alternatives was for the legislature, and “there are a number of reasons why the Legislature may have made the choice it did.”\textsuperscript{64} Thus, as is not unusual for a court applying the deferential standard, the \textit{Fein} court was willing to take the findings of the legislature and create rational bases for the legislative enactment. The court noted the leg-

\begin{footnotesize}
\begin{enumerate}
\item [62.] “[T]he Legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages.” \textit{Fein}, 38 Cal. 3d at 162, 695 P.2d at 683, 211 Cal. Rptr. at 386.
\item [63.] \textit{Id.}
\item [64.] \textit{Id.} at 162-63, 695 P.2d at 683, 211 Cal. Rptr. at 386. It is interesting to note that while the California Supreme Court applied the rational basis standard in examining the legislature’s solution to the malpractice crisis, they were not explicit as to which equal protection clause, state or federal, they were proceeding under. This is a minor point where the state supreme court considers the state constitution to be coextensive with its federal counterpart. However, an explicit indication by the court as to choice of constitution makes analysis of the opinion simpler. \textit{Compare}, Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) (federal appeals court judge first upheld reduction of damage award against federal equal protection challenge then certified to the Texas Supreme Court the question of whether the Texas damage statute denied equal protection under the Texas Constitution) and Sibley v. Board of Supervisors, 462 So. 2d 149, 158 (La. 1985) (upholding statute against equal protection challenge under both state and federal constitutions) \textit{with Fein}, 38 Cal. 3d at 161-64, 695 P.2d at 682-84, 211 Cal. Rptr. at 385-87 (court was not explicit whether grounds for upholding statute was state or federal equal protection clauses); Prendergast v. Nelson, 199 Neb. 97, __, 256 N.W.2d 657, 668 (1977) (plurality opinion) (equal protection challenges rejected under both state and federal constitutions) \textit{and} Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (Ohio Com. Pl. 1985) (“This court holds [the medical malpractice limitation on general damages] violates the protection of both the Ohio and federal Constitutions beyond a reasonable doubt.” \textit{Id.} at __, 495 N.E.2d at 56. However, in \textit{Duren} there is no indication as to whether the statute was unconstitutional on an equal protection basis, due process basis, or both. In addition, there is no real indication what state or federal constitutional standards were applied in striking the statute down).
\end{enumerate}
\end{footnotesize}
islature's finding that as a result of "the inherent difficulties involving such damages" the size of noneconomic damage awards was unpredictable. From this finding the court posited that it would be reasonable for the legislature to determine that an across-the-board limit might stabilize insurance rates. The court also stated that the legislature might have determined the cap would promote settlement by reducing the reward for gambling on a large pain and suffering award by the jury.

C. Intermediate Scrutiny

At the end of the 1960s, the Supreme Court to some degree moved away from the use of the rigid two-tier analysis to the occasional use of an intermediate scrutiny standard. For classifications involving gender, indigency, and illegitimacy, the Court heightened its scrutiny. For these cases the Court declared that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Put another way, there must be a substantial relationship between the means and ends of the legislation. Three cases are presented to demonstrate the correct and internally coherent use of the intermediate scrutiny standard. The fourth and final case indicates the pitfalls courts may encounter if federal equal protection standards are not isolated from state equal protection standards.

65. Fein, 38 Cal. 3d at 162-63, 695 P.2d at 683, 211 Cal. Rptr. at 386.
66. Id.
67. One commentator identifies the birth year of the intermediate scrutiny test as 1968. In that year the Supreme Court decided Levy v. Louisiana, 391 U.S. 68 (1968), a case in which the Court ostensibly applied the rational basis standard to strike down legislation which denied illegitimate children the right to recover for the wrongful death of their mother. Refining Middle-Tier Scrutiny, supra note 20, at 1501. The standard in Levy had to have been more strict than the rational basis test, for as another commentator observed, "the Warren Court's announcement...[that the rational basis] test was to be applied was tantamount to an announcement of the constitutionality of the legislation." See Bice, supra note 30, at 698.
71. Reed, 404 U.S. at 76 (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
72. [A] court employing the means scrutiny standard appraises more carefully the factual assumptions that underlie the asserted connection between legislative means and ends. Under this test, the courts presumably would not question the asserted legislative goal of ameliorating the crisis in medical malpractice, but would inquire whether a crisis does in fact exist and whether the legislation in question substantially alleviates that crisis.

Redish, supra note 2, at 772-73.
In *Arneson v. Olson*, the North Dakota Supreme Court struck down a $300,000 limitation on total damages as violative of the equal protection clauses of the state and federal constitutions. The court explained its standard of review as "whether there is a sufficiently close correspondence between statutory classification and legislative goals so as not to violate equal protection requirements of the State and Federal Constitutions." The court then proceeded to examine the record before it for evidence of the necessary nexus. The record indicated that North Dakota had a much lower incidence of malpractice claims than other states, and that insurance premiums were the sixth lowest in the nation. Based on these findings, the court held that the limitation on damages did not promote the legislative goal of keeping malpractice insurance premiums down. It seems clear that the level of scrutiny was greater than rational, since the court did not defer to the wishes of the legislature.

In *Jones v. State Board of Medicine*, the Supreme Court of Idaho rejected the rational basis standard on the ground that the state's malpractice statute created a "discriminatory classification" in violation of the state's equal protection clause. The court applied the intermediate scrutiny test and found the statute would be discriminatory against those with damages in excess of the statutory limitation of $150,000. However, the court was hesitant, on the facts before it, to strike the statute down until it was able to ascertain the nexus between the statutory means and legislature's ends.

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73. 270 N.W.2d 125 (N.D. 1978).
75. *Arneson*, 270 N.W.2d at 135. Though the court did not say so explicitly, they used the intermediate scrutiny standard.
76. *Id.* at 136.
77. *Id.* at 135.
78. 97 Idaho 859, 555 P.2d 399 (1976).
79. The court seemed concerned that adoption of the rational basis test would cause the court to neglect its responsibilities in this instance:

> When the [rational basis] test . . . has been utilized, the result has ordinarily been the removal of the court from any but the most cursory review of the challenged legislation. It invites courts to conceive purposes which would justify statutes. The validity or invalidity of discriminatory classifications may under that test depend solely upon the extent of the imagination of the reviewing court and/or its adherence to the theory of judicial restraint [. . .]. While we recognize and agree with the concept of judicial restraint [. . .] nevertheless, blind adherence and over-indulgence results in abdication of judicial responsibility.

*Id.* at __, 555 P.2d at 411 (citations omitted).
80. *Id.* at __, 555 P.2d at 410.
81. "[T]he record here presents no factual basis for understanding the nature and scope of the alleged medical malpractice crisis nationally or in Idaho. It is thus impossible for this Court to assess the necessity for this legislation." *Id.* at __, 555 P.2d at 413.
Therefore, the case was remanded to the trial court for presentation of additional evidence and findings.82

In *Carson v. Maurer*,83 the Supreme Court of New Hampshire also applied the intermediate scrutiny standard when it addressed the constitutionality of the state’s limit on noneconomic damages under the state’s equal protection clause.84 In doing so, the court noted that the federal courts used this standard only for gender and illegitimacy cases. However, the court observed that it was “free to grant individuals more rights than the Federal Constitution requires,”85 and was similarly free to use the intermediate test to scrutinize other classifications when examining the state constitution.86 Applying the intermediate scrutiny test, the court found the relationship between statutory means and legislative ends to be “weak.”87

The court next turned to the argument that the statute was saved by limiting only noneconomic damages, rather than total damages. The court said a victim “gains” nothing from receiving economic damages; the only compensation for pain and suffering is noneconomic damages.88

*Johnson v. St. Vincent Hospital, Inc.*89 is a good illustration of the problems state courts may have in applying the federal equal protection standard to state law. In *Johnson*, the Supreme Court of Indiana upheld a $500,000 statutory limitation on total damages in the face of the intermediate scrutiny test. The court found a “fair and substantial” relationship between the statutory limitation imposed by the Indiana Medical Malpractice Act and the classification of injured patients because the Act guaranteed recovery of up to $500,000.90 The court stated that this was a substantial benefit in light of the fact that the “probability that a wrongfully injured patient would in fact collect more than $500,000 in damages [from the insurance or personal assets of a health care provider] would be very small.”91

82. *Id.* at ___, 555 P.2d at 416.
83. 120 N.H. 925, 424 A.2d 825 (1980).
84. *Id.* at ___, 424 A.2d at 831. N.H. REV. STAT. ANN. § 507-C:7 11 (1983) placed a $250,000 limit on noneconomic damages.
85. *Carson*, 120 N.H. at ___, 424 A.2d at 831.
86. *Id.*
87. *Id.* at ___, 424 A.2d at 836. The court considered the two weaknesses to be “‘[f]irst, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few individuals suffer noneconomic damages in excess of $250,000.’” *Id.* (quoting *California Equal Protection Challenge, supra* note 19, at 951).
89. 273 Ind. 374, 404 N.E.2d 585 (1980).
90. *Id.* at ___, 404 N.E.2d at 601; IND. CODE ANN. § 16-9.5-2-2 (Burns 1983).
91. *Johnson*, 273 Ind. at ___, 404 N.E.2d at 601.
Theoretical problems exist in the court's use of the intermediate scrutiny test. The court was applying the equal protection standards of the federal constitution. The Supreme Court, however, has yet to extend its use of the intermediate scrutiny test to any classifications other than gender, indigency and illegitimacy. The court could have reached the same result while staying theoretically consistent by applying the rational basis test of the state or federal constitutions or, alternatively, applying the state intermediate standard to the constitution. Under the rational basis test, the court would merely defer to the judgment of the legislature. Under the state intermediate scrutiny test, it would be within the court's power to expand intermediate scrutiny to reach the state malpractice statute, because the state's highest court is the final arbiter of the state constitution.

II. THE SUBSTANTIVE DUE PROCESS AND QUID PRO QUO CHALLENGES

A. Substantive Due Process/Quid Pro Quo Standards

Due process has two components, a procedural component and a substantive component. While the procedural component is discussed occasionally in the context of medical malpractice statutes, the substantive portion of due process is more frequently litigated, along with its counterpart the "quid pro quo." This Comment limits its analysis to this more commonly encountered issue.

The due process clause of the fourteenth amendment provides that a state may not deprive any citizen of "life, liberty, or property without due process of law." Limitations on damages circumscribe a jury's ability to compensate a plaintiff as it sees fit. Thus, the argument exists that a statutory limitation on damages deprives a plaintiff of some of his or her "property" — the common law right to receive whatever the jury awards.

Since 1937 the Supreme Court has utilized a two-tier scrutiny similar to traditional equal protection scrutiny when applying the substantive due

92. See supra notes 68-70 and accompanying text.
93. See supra note 37 and authorities cited therein.
94. The fourteenth amendment due process clause reads in pertinent part: "No State shall ... deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1. Before a person is deprived of life, liberty or property, he or she must be accorded "that process which is due"; that is, a fair hearing or other procedure. See Bice, supra note 30, at 711.
95. U.S. Const. amend. XIV, § 1.
96. Common law jury awards are subject to reduction as well. See, e.g., Wis. Stat. § 805.15(6) (1985-86).
process theory. The first tier adopts a deferential stance toward economic and social legislation. Legislation of this type is "presumptively constitutional and will be sustained if not wholly arbitrary or capricious." On the other hand, where legislation impinges on fundamental rights or restricts political processes, "the state must prove a compelling reason to justify the legislation."

In conjunction with the substantive due process analysis, the courts often address the need for a reasonable substitute, or quid pro quo, for any legislative limitation or abrogation of a preexisting common law right. The Supreme Court has never decided the question of whether a quid pro quo is necessary to abrogate a common law remedy. Although many other courts have addressed the issue, their holdings have varied widely.

B. Substantive Due Process/Quid Pro Quo Decisions

Most, if not all, courts consider the deferential standard the one to apply when examining medical malpractice statutes under a substantive due process analysis. In Sibley v. Board of Supervisors, Louisiana's $500,000 limitation on state tort liability was at issue. The court made it clear that it considered the limitation to be economic, social-type legislation meriting great deference. The court held the standard for examining such legislation should be whether "the regulation is reasonable in relation to the goal sought to be attained and is adopted in the interest of the community as a whole." The court's rationale for applying this standard was that it was not its place to "second-guess the legislators in their heavy responsibility." The court upheld the statute.

97. While the 1934 case of Nebbia v. New York, 291 U.S. 502 (1934), indicated a possible shift away from substantive due process, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), marked the beginning of the end for serious judicial scrutiny of the ends of the legislature. In West Coast Hotel, the Court upheld a state minimum wage law for women. In the process, the Court also overruled a case decided at the high point of substantive due process, Adkins v. Children's Hosp., 261 U.S. 525 (1923), in which the Court had struck down a similar minimum wage for women. See Nowak, supra note 17, § 11.4, at 353.

98. Smith, supra note 6, at 378; see also Redish, supra note 2, at 784.

99. Smith, supra note 6, at 378 (footnote omitted).

100. Redish, supra note 2, at 785. Although Professor Redish noted that some courts have held that due process requires a quid pro quo before the legislature may limit or extinguish a common law right, he found the origin of the doctrine "dubious." Id.

101. See Boyd v. Bulala, 647 F. Supp. 781, 786 (W.D. Va. 1986) (stating that the Supreme Court has never decided whether a quid pro quo is necessary).

102. 462 So. 2d 149 (La. 1985).

103. Id. at 157. For a discussion of the facts of this case, see supra notes 48-50 and accompanying text.

104. Id. at 157.

105. Id.
A similar rationale was given by the California Supreme Court in upholding that state’s $250,000 limitation on noneconomic damages in medical malpractice actions. In *Fein v. Permanente Medical Group*, the court observed that a plaintiff had “no vested property right in a particular measure of damages,” and that the legislature has broad powers to modify common law remedies. Because of the legislature’s broad powers in this area, the court held that it was not for the judicial authorities to pass judgment on the wisdom of the legislation.

In conjunction with the substantive due process analysis, there typically is some discussion of whether a quid pro quo is necessary if the legislature limits the plaintiff’s right to receive the full complement of damages the jury awards. On one level of analysis, the courts often refuse to find a quid pro quo necessary before the legislature may limit the common law right to damages. A possible rationale for the refusal to find a quid pro quo required would be a hesitancy to create a precedent which might haunt a court every time it addressed a legislative limitation of a common law right.

In addition to this hesitancy to create precedent, a second, and perhaps more persuasive reason why courts have refused to find a quid pro quo necessary is that the United States Supreme Court has never explicitly made such a finding. In *Jones v. State Board of Medicine*, the Supreme Court of Idaho considered whether a quid pro quo was necessary to uphold

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107. Id. at 157, 695 P.2d at 679, 211 Cal. Rptr. at 382 (quoting American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 368-69, 683 P.2d 670, 676, 204 Cal. Rptr. 671, 677 (1984)).
108. Id.
109. Id. at 158, 695 P.2d at 679, 211 Cal. Rptr. at 382. The court found it significant that the legislature limited only noneconomic damages, leaving the plaintiff free to recover unlimited economic damages. The court noted that some commentators had expressed doubt as to the wisdom of awarding such noneconomic damages, as well as questioning the ability of money to adequately compensate for noneconomic injuries. Thus the court concluded:

> Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages — pecuniary as well as nonpecuniary — the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.

111. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (expressing doubt that a quid pro quo was required, but not specifically holding); *see also* *Boyd v. Bulala*, 647 F. Supp. 781, 786 (W.D. Va. 1986) (holding that the U.S. Supreme Court has never clearly established the need for a quid pro quo).
Idaho's $300,000 limitation on damages.\textsuperscript{113} The court indicated that it had serious reservations as to the need for a quid pro quo, since the doctrine stemmed from dicta.\textsuperscript{114} The Idaho court also observed that other courts have questioned whether a quid pro quo was required.\textsuperscript{115} It was the court's opinion that the United States Supreme Court "did not intend to engraft upon the traditional due process test an additional standard when the challenged statute involves alteration of some prior existing common law doctrine."\textsuperscript{116} Accordingly, the Idaho court refused to find a quid pro quo necessary.

Although most courts agree that a quid pro quo is not necessary, on a secondary level of analysis there is often some discussion as to whether the damage limitation statute provides a quid pro quo.\textsuperscript{117} The courts disagree over whether it does. Courts finding a quid pro quo hold the increased collectibility of the judgment, owing to more widely available malpractice insurance, to be a reasonable substitute for the limitation on damages awarded. The rationale for this argument is that it is better to collect some damages than none at all.

For example, in \textit{Prendergast v. Nelson},\textsuperscript{118} the Nebraska Supreme Court, while rejecting the requirement of a quid pro quo, found that a quid pro quo in fact existed:

In return for relatively minor restrictions on the remedy and the ceiling of $500,000, the patient receives assurance of collectibility of

\textsuperscript{113} \textit{Id.} at \textit{\_}, 555 P.2d at 408-09.
\textsuperscript{114} The \textit{Jones} court identified New York Cent. R.R. v. White, 243 U.S. 188, 201 (1917), as the origin of the idea that due process requires a quid pro quo. \textit{See also} Redish, \textit{supra} note 2, at 785 (also identifying \textit{White} dicta as the origin of the quid pro quo doctrine).
\textsuperscript{115} \textit{Jones}, 97 Idaho at \textit{\_}, 555 P.2d at 409.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} Discussion of whether there is a quid pro quo, despite the holding that one need not exist, is due to the uncertainty surrounding this issue about which the Supreme Court has been less than clear and forthcoming. New York Cent. R.R. v. White, 243 U.S. 188 (1917), is thought by some courts and commentators to be the origin of the quid pro quo. However, commentators such as Professor Redish have criticized the assertion that a quid pro quo doctrine \textit{was} created in \textit{White}. \textit{See} Redish, \textit{supra} note 2, at 785-90. As recently as a decade ago, the Supreme Court had a chance to clarify the issue but declined to do so. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 (1978), the Court held "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." \textit{Id.} Despite that holding, the Court declined to reach whether a quid pro quo was necessary since the law at issue provided a quid pro quo for the common law remedies it replaced. \textit{Id.}

Because of the uncertainty surrounding the issue, courts are forced to embody the \textit{White} considerations into each opinion they write. They are able to say they doubt the right to a quid pro quo exists; nevertheless, most feel obligated to decide whether a quid pro quo exists in each specific case.

\textsuperscript{118} 199 Neb. 97, 256 N.W.2d 657 (1977) (plurality opinion).
any judgment recovered. . . . [T]he collectibility of a judgment is a matter of considerable value, as demonstrated by the evidence in this case that the plaintiff Prendergast, except for the new law, would not be able to acquire any malpractice insurance.\textsuperscript{119}

A similar rationale is found in \textit{Fein v. Permanente Medical Group}.\textsuperscript{120} The California Supreme Court rejected the need for a quid pro quo, but felt that "the preservation of a viable medical malpractice insurance industry . . . was . . . an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs."\textsuperscript{121}

On the other hand, not all courts agree that the damage limitation statute would provide a quid pro quo if one were necessary. This argument criticizes the fact that the benefit the doctors receive — presumably restricted liability — comes from the plaintiff’s award, without any consideration for the seriousness of plaintiff’s injury. The district court in \textit{Boyd v. Bulala}\textsuperscript{122} expressed this sentiment:

[T]here is nothing in the way of a corresponding benefit flowing to the injured plaintiff. There is no certainty of recovery for the plaintiff, and should he be successful in the effort to recover, he then encounters the restriction of the cap, no matter how serious or debilitating his injuries may be.\textsuperscript{123}

III. \textbf{IS WISCONSIN’S NONECONOMIC DAMAGE LIMITATION UNCONSTITUTIONAL?}

Wisconsin’s noneconomic damage limitation is of recent origin and has yet to be judicially challenged.\textsuperscript{124} However, owing to the frequency with which such limitations have been attacked in recent years, Wisconsin’s version is sure to encounter some form of challenge in the near future. What the Wisconsin Supreme Court ultimately will hold in determining the constitutionality of this statute will depend on three related factors. The first factor is whether the challenge proceeds under the United States or the Wisconsin Constitution. The second factor is how much deference the Wisconsin Supreme Court is willing to give the legislature. In reality, this is an examination of how prone the Wisconsin court is to applying rational basis scrutiny to legislative enactments. The third factor will be the Wisconsin Supreme Court’s respect for precedent or, conversely, how willing it proves

\begin{itemize}
\item \textsuperscript{119} \textit{Id.} at \textsuperscript{256 N.W.2d at 671.}
\item \textsuperscript{120} 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).
\item \textsuperscript{121} \textit{Id.} at 160 n.18, 695 P.2d at 681-82 n.18, 211 Cal. Rptr. at 385 n.18.
\item \textsuperscript{122} 647 F. Supp. 781 (W.D. Va. 1986).
\item \textsuperscript{123} \textit{Id.} at 786 n.3.
\item \textsuperscript{124} \textit{See Wis. Stat. §§ 655.017, 893.55(4) (1985-86).}
\end{itemize}
to be in expanding its lists of fundamental rights and suspect classifications under the strict and intermediate scrutiny standards.

A. Federal Constitutional Challenges to Wisconsin’s Noneconomic Damage Limitation

For the purpose of analyzing a challenge to Wisconsin’s noneconomic damage limitation, the preeminent consideration is whether the challenge proceeds under the federal or state constitution. The other two factors are actually subparts of this factor. Should the statute be challenged only under the federal Constitution, the outcome is likely to be an upholding of the statute under the rational basis standard.

One of the tenets of our federal system is that Wisconsin courts, like all state courts, are bound by the holdings of the United States Supreme Court when deciding federal constitutional issues. In the area of federal equal protection, the United States Supreme Court’s holdings have limited lower courts’ ability to use a standard more rigorous than the rational basis standard. To date, the list of suspect classes and fundamental rights under the strict scrutiny standard is quite limited. As of this writing, the United States Supreme Court recognizes no fundamental right under the federal Constitution to recover damages in a tort action. Plaintiffs who have characterized the right to collect damages as “fundamental” have not been successful. Similarly, a limitation on damages is not among the few classifications the Court considers a suspect classification. Plaintiffs who have advanced this argument have also been rebuffed. A similarly short list of classifications meriting federal intermediate scrutiny have been cre-

125. But see Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980) (finding a “fair and substantial” relationship between a statutory limitation and the classification of injured patients, though the Supreme Court has yet to extend use of the federal intermediate scrutiny test to classifications other than illegitimacy, gender and indigency); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (disregarding the limited number of federal intermediate scrutiny classifications in striking down a limitation on damages as a violation of federal equal protection as well as state equal protection).
126. See supra notes 25-29 and accompanying text.
127. See supra note 29 and accompanying text.
129. See supra notes 25-27 and accompanying text.
ated by the United States Supreme Court. Only gender, illegitimacy, and indigency merit this scrutiny at present.

There is thus a high probability that the Wisconsin Supreme Court would apply the rational basis standard to a federal equal protection challenge. A federal equal protection challenge to which the court applies the rational basis standard is bound to fail. Courts apply the rational basis standard when neither a fundamental right nor suspect classification is involved. The legislature does not have to choose the best or even the wisest means of achieving its goals; the classification will be upheld if any set of facts may be conceived to justify it. As one commentator has observed, use of the rational basis test "was tantamount to an announcement of the constitutionality of the legislation." In sum, a federal equal protection challenge to Wisconsin's noneconomic damage cap would fail, since the Wisconsin Supreme Court is bound by federalism to apply federal equal protection standards as they have been construed by the United States Supreme Court.

Failure is also the result if the challenge is brought on federal substantive due process grounds. This is due to the Supreme Court's observation, over a century ago, that plaintiffs have no "property" right to any particular measure of damages. Since 1937, the Court has given legislatures large amounts of deference when determining the constitutionality of social and economic legislation; the limitation on damages has been considered a classic case of economic legislation. The Wisconsin Supreme Court is bound by federalism to apply federal substantive due process as interpreted by the United States Supreme Court.


134. See Bice, supra note 30, at 698.

135. In a widely quoted passage from Munn v. Illinois, 94 U.S. 113 (1876), the Court held: A person has no property, no vested interest, in any rule of the common law... Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

Id. at 134.

136. See supra note 98 and accompanying text.

137. See, e.g., Boyd, 647 F. Supp. at 786.
On the issue of the need for a quid pro quo, if the challenge is brought on federal constitutional grounds, the outcome is failure. The courts that have struggled with the United States Supreme Court's holding on this doctrine agree that a substitute is not necessary to limit or abrogate a common law remedy.138

In all likelihood, the Wisconsin Supreme Court will not be persuaded by any of these federal challenges. Although the federal bases of challenge do not look promising, challenges under the Wisconsin Constitution remain as an alternative to be explored.

B. Wisconsin State Constitutional Challenges: The Traditional Equal Protection Standards and the Substantive Due Process Standard

Realistically, neither traditional state equal protection nor state substantive due process standards hold much promise for the challenging plaintiff under Wisconsin law. In large part, this is due to the fact that Wisconsin considers its due process and equal protection clauses to be substantially coextensive with their federal counterparts.139 This means that under the state equal protection clause, Wisconsin limits the scope of its fundamental rights and the reach of its suspect classifications to similar rights and classifications found in the federal Constitution.140 If the rights and classifications are the same, it is reasonable to assume that the outcomes will be the same. Certainly, it is true that Wisconsin has yet to consider a limitation on damages to be an impingement on a fundamental right, nor has it found such a limitation to create a suspect classification. Judging from the case law, on a state constitution equal protection challenge, the Wisconsin Supreme Court would apply the rational basis standard in examining the state limitation on noneconomic damages.

Even stronger evidence of Wisconsin's likelihood of applying the rational basis standard to a state constitution equal protection challenge is found in *State ex rel. Strykowski v. Wilkie.*141 In that case, the court applied the rational basis standard in examining the constitutionality of the patient

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138. See supra note 110 and accompanying text.
139. See Treiber v. Knoll, 135 Wis. 2d 58, 67 n.3, 398 N.W.2d 756, 759 n.3 (1987) (protection afforded by article I, section 1 of the Wisconsin Constitution is substantially equivalent to the federal equal protection clause); Chicago & N.W. Transp. Co. v. Pedersen, 80 Wis. 2d 566, 571 n.1, 239 N.W.2d 316, 318 n.1 (1977) (article I, section 1 of the Wisconsin Constitution is substantially equivalent to the federal fourteenth amendment due process clause); see also State *ex rel.* Cresci v. Schmidt, 62 Wis. 2d 400, 414, 215 N.W.2d 361, 367 (1974); State *ex rel.* Sonneborn v. Sylvester, 26 Wis. 2d 43, 50, 132 N.W.2d 249, 252 (1965).
140. See, e.g., *In re Nelson,* 98 Wis. 2d 261, 296 N.W.2d 736 (1980); County of Milwaukee v. Proegler, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980).
141. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).
compensation review panel system then in effect. The court found that Chapter 655 of the Wisconsin Statutes satisfied Wisconsin's "five criteria of reasonableness."

As is to be expected under the rational basis test, the Strykowski court was quite deferential to the legislature's attempts to rectify the medical malpractice crisis:

This court is not concerned with the wisdom or correctness of the legislative determination . . . ; its task is to determine only whether there was a reasonable basis upon which the legislature might have acted.

We believe there is a rational basis upon which the legislature could and did act when enacting Chapter 655.

[The legislature's] findings, while not binding upon the court, carry great weight. The legislature cited a sudden increase in the number of malpractice suits, in the size of awards, and in malpractice insurance premiums, and identified several impending dangers: increased health care costs, the prescription of elaborate "defensive" medical procedures, the unavailability of certain hazardous services and the possibility that physicians would curtail their practices.


144. Strykowski, 81 Wis. 2d at 509, 261 N.W.2d at 442-43. Wisconsin's reasonableness test provides:

(1) All classifications must be based on substantial distinctions which make one class really different from another.

(2) The classification adopted must be germane to the purpose of the law.

(3) The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class.

(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Id. at 509 n.8, 261 N.W.2d at 442 n.8 (footnote omitted); see also Dane County v. McManus, 55 Wis. 2d 413, 198 N.W.2d 667 (1972) (applying the same test).

After applying this test to the Strykowski facts, the court reached the following conclusions: Medical malpractice actions are substantially distinct from other tort actions. The classification is plainly germane to the act's purposes. The law applies to all victims of health care providers as described therein. The legislature declares that the circumstances surrounding medical malpractice litigation and insurance required the enactment of the legislation.

Strykowski, 81 Wis. 2d at 509, 261 N.W.2d at 442-43.

145. 81 Wis. 2d at 508, 261 N.W.2d at 442 (citations omitted).
Though *Strykowski* is not factually on point, it still provides a strong indication of how the Wisconsin Supreme Court will most likely react when presented with an equal protection challenge to the noneconomic damage limitation. In *Strykowski*, the court cited the factors upon which the legislature based its opinion, and concluded there was a rational basis for the legislature's findings. This deference closely parallels that found in cases which apply the rational basis standard to damage limitations.146

Finally, a Wisconsin Constitution substantive due process challenge is not likely to result in the Wisconsin court striking down the state's noneconomic damage limitation. Again, the reason is the Wisconsin Supreme Court's holding that the state due process clause is coterminous with the federal due process clause. On the issue of the quid pro quo, a similar outcome is likely. A good indication of how the Wisconsin Supreme Court would rule on a quid pro quo challenge to the state's noneconomic damage limitation is found in *Strykowski*. There the court observed that the United States Supreme Court has yet to explicitly require the quid pro quo.147 Because the United States Supreme Court did not require a quid pro quo, the Wisconsin court likewise held that it did not consider one necessary.148 Based on this holding, it seems likely that Wisconsin will not be receptive to a state constitution due process challenge.

**IV. Challenge Under the State Intermediate Scrutiny Standard**

While state courts are limited by the holdings of the United States Supreme Court when applying federal constitutional standards, there are no such restrictions on these courts when applying their state constitutions. As one state judge noted, a state is "free to grant individuals more rights than the Federal Constitution requires" under its state constitution.149 The United States Supreme Court has also explicitly expressed its approval of this notion.150 Based on the unlikelihood of striking down the damage stat-


147. *Strykowski*, 81 Wis. 2d at 520, 261 N.W.2d at 447-48.

148. *Id.*


150. In City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), the Court held "a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *Id.* at 293; *see also* Brennan, *supra* note 37, at 500-01 (recognizing that state courts may decline to follow U.S. Supreme Court holdings where a state court is applying its own constitution); Comment, *The Good Faith Exception to the Exclu-
ute under any of the standards heretofore discussed, the state equal protection intermediate scrutiny standard is the only remaining judicial avenue.\(^{151}\)

Opponents of the damage limitations have had some success where they have persuaded state courts to apply this more rigorous equal protection standard.\(^{152}\) Under this standard, the court examines the evidence for itself. In the case of a damage limitation challenge, the Wisconsin court would examine the correspondence between the statutory classification and the legislative goal of insuring physicians at reasonable rates.\(^{153}\) Other issues for the court's consideration would include the statute's success in abating the malpractice insurance crisis,\(^{154}\) whether premium rates have dropped,\(^{155}\) and whether the number of insured physicians has increased.\(^{156}\)

In making the challenge, plaintiffs would need to stress that the statute is arbitrary and creates undue hardship on a small, unfortunate group of plaintiffs. There is some limited authority from other states' case law and in the scholarly commentary for such an assertion to the Wisconsin court. In \textit{Carson v. Maurer},\(^ {157}\) the New Hampshire Supreme Court found the "legislative goal of rate reduction and the means chosen to attain that goal is weak."\(^ {158}\) One of the reasons for that finding was that few plaintiffs suffer


\(^{152}\) A "legislative option" also exists. This option is unique to Wisconsin, since the legislature put a "sunset" provision into Wisconsin's noneconomic damage cap. See \textit{Saichek}, supra note 10. In 1991, the legislature must vote to continue the limitation; if it takes no action, the provision will expire. Advocates for repeal of the noneconomic damage cap could thus lobby the legislature to allow the provision to expire.


\(^{154}\) \textit{Arneson}, 270 N.W.2d at 135.

\(^{155}\) \textit{Jones}, 97 Idaho at --, 555 P.2d at 414.


\(^{157}\) \textit{Id.}

\(^{158}\) \textit{Id.} at --. 424 A.2d at 836-37. In \textit{Fein v. Permanente Medical Group}, Chief Justice Bird, in dissent, expressed a similar opinion. She pointed out that only fourteen persons had been awarded total damages over $250,000 that year. \textit{Fein}, 38 Cal. 3d 137, 172, 695 P.2d 665, 690, 211 Cal. Rptr. 368, 393 (1985) (Bird, C.J., dissenting); see also \textit{California Equal Protection Challenge}, supra note 19, at 951. The problem has been described as follows:

\[\text{Any reduction in the amount of recoverable damages will lead to a decrease in the amount of paid-out damage awards for medical malpractice insurers, thus theoretically decreasing premium costs. If such a decrease would in fact occur, a substantial relationship between means and ends for this statutory provision would be established. Unfortu-} \]
noneconomic damages in excess of the statutory limit of $250,000. The inference the court sought to make was that the limitation had little or no effect on the malpractice insurance crisis, since almost all plaintiffs had damages less than the limitation. The statute thus created a classification for which there was arguably no reason. The classification did not bear a "fair and substantial" relationship to the legislature's goals, and therefore the statute was struck down.

Wisconsin's damage limitation is subject to the same criticism, only to a greater degree. Wisconsin's damage limitation of $1,000,000 is four times higher than New Hampshire's. If it is indeed true that "only 2.5 percent of all medical malpractice claimants receive noneconomic damages in excess of $100,000," then Wisconsin's limitation has a miniscule impact on amounts paid out. If a challenger could persuade the court to apply intermediate scrutiny, Wisconsin's court might find there was no fair and substantial relation between the statutory means and legislative ends.

A second argument in favor of the application of the state intermediate scrutiny standard would be that the amount and type of the limitations themselves are arbitrary. Some states have enacted a limitation on total damages in reaction to the malpractice insurance crisis. Others only limit noneconomic damages. While the rationale is identical for both — an attempt to bring the malpractice insurance crisis under control — the means chosen are significantly different. The disparity in types and amounts of the limitations may lend credence to the argument that legisla-

nately, the effectiveness of this provision is diminished by a number of competing factors. First, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few individuals suffer noneconomic damages in excess of $250,000. Furthermore, in light of the total lack of statistical evidence available to the legislature, the amount of noneconomic losses exceeding $250,000 was probably unknown at the time of MICRA's enactment, and is probably negligible today.

Id. (footnotes omitted). For a description of the MICRA legislation referenced above, see supra note 59.

160. Id. at __, 424 A.2d at 838.
161. Minter, supra note 155, at 54.
162. What this argument fails to take into account is that a statutory ceiling on claims may make it easier from an actuarial standpoint to set malpractice premium rates. See Fein, 38 Cal. 3d at 163, 695 P.2d at 683, 211 Cal. Rptr. at 386. The counterargument is that no figures on the effects of the damage limitation on reducing insurance premiums are available at present. Minter, supra note 155, at 54.
163. See, e.g., Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) ($150,000 per claim/$300,000 per occurrence); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (plurality opinion) ($500,000).
164. See, e.g., Fein, 38 Cal. 3d at 137, 695 P.2d at 665, 211 Cal. Rptr. at 368 ($250,000); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) ($250,000).
tures had no hard facts from which they could infer that a cap of a certain amount would abate the malpractice insurance crisis.

Though the state intermediate standard is the most promising avenue of challenge, in the final analysis this challenge is not likely to succeed. Currently, Wisconsin has limited the scope of its state intermediate scrutiny to classifications similarly scrutinized by the United States Supreme Court. Thus, Wisconsin is most likely to apply the rational basis standard to its statute. This assertion is based on the fact that the majority of courts apply that standard, as well as Wisconsin precedent indicating the court's deference toward legislative attempts to rectify the malpractice insurance crisis.

V. CONCLUSION

Wisconsin’s noneconomic damage limitation has yet to be challenged. However, based on the number of similar challenges in recent years, Wisconsin’s statute will likely encounter a challenge in the near future.

Wisconsin is unlikely to apply federal equal protection strict or intermediate scrutiny to its statute, due to the principles of federalism. The United States Supreme Court has yet to find the limitation of damages to create a suspect class or impinge a fundamental right. Similarly unlikely would be the Wisconsin court striking down the statute on either a federal or state substantive due process/quid pro quo theory. Here, too, Wisconsin considers its due process clause coextensive with its federal counterpart, and the federal clause has not been used to find a damage limitation unconstitutional.

Currently, the most promising avenue for challengers of the Wisconsin statute is to seek to persuade the Wisconsin Supreme Court to expand its use of intermediate scrutiny to include damage limitations such as the one at hand. Under such a standard, the Wisconsin court would independently examine the relationship between statutory means and legislative ends.

While the state intermediate scrutiny standard is the challenger’s best avenue of attack, and to be successful he must persuade the Wisconsin Supreme Court to expand its use of that standard, in the final analysis it is not likely that the court would be receptive to the argument. The Wisconsin Supreme Court has yet to expand the state’s fundamental rights and suspect classes, though it clearly has the right to do so under the Wisconsin Constitution. Based on the Wisconsin Supreme Court’s refusal to break

165. See State v. Hill, 91 Wis. 2d 446, 283 N.W.2d 451 (Ct. App. 1979) (intermediate scrutiny applied to gender-based classification); Blumreich v. Kaquatosh, 84 Wis. 2d 545, 267 N.W.2d 870 (1978) (intermediate scrutiny applied to illegitimacy).
from the United States Supreme Court's classifications, a challenge to Wisconsin's noneconomic damage limitation is likely to fail.

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